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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1942

No. 1024

HARRY BECKER,
Petitioner,

vs.

LOEW'S, INCORPORATED, A DELAWARE CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

MOSES LEVITAN,
Counsel for Petitioner.

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Dam v. Kirk La Shelle, 175 Fed. 902 8, 12, 17

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TEXTBOOKS CITED.

Frolich & Schwartz on The Law of Motion Pictures 22

Ladas: International Protection of Literary and Artistic Property (Harvard Studies in International Law III) (1938) Vol. 2 21

Weil on Copyright 14, 19

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To the Honorable, the Chief Justice, and Associate Justices of the Supreme Court of the United States:

Your petitioner, Harry Becker, respectfully prays for the writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit to review a judgment of that court entered on the twentieth day of February, 1943, in the case numbered and entitled on its docket No. 8073, Harry Becker, Plaintiff-Appellee vs. Loew's, Incorporated, Defendant-Appellant, reversing the decision of the United States District Court in and for the Northern District of Illinois, Eastern Division. A transcript of the record in the case, including the proceedings in said Circuit Court

of Appeals, is furnished herewith. The decision of the Circuit Court of Appeals is reported in 133 Fed. (2d) 889, (R. 314-321).

Summary and Short Statement.

This case involves the construction of Sections 1b and 4 of the Copyright Act (17 U. S. C. A.; 35 Stat. 1075, 1076, Chap. 320) (R. 314). The questions presented are whether Section 1b of the Act, granting to authors the exclusive right to dramatize their non-dramatic works, extends to a book containing neither story, plot nor characters, and whether the title of a copyrighted work is protected under said Section 1b and Section 4, which extends copyright to "all of the writings of an author." Neither of these questions, both of which are of great importance to authors and the public generally, has ever been decided by this Court.

Suit was brought in the District Court of the United States for the Northern District of Illinois, Eastern Division, by Harry Becker, petitioner herein, against Loew's, Incorporated, a Delaware corporation, for infringement under the Copyright Laws of the United States and for unfair competition (R. 2-11).

Plaintiff alleged that his copyrighted book entitled "We Who Are Young" (R. 67, Pltf's Ex. 2, a physical exhibit), published in 1936, was infringed by defendant's motion picture, also entitled "We Who Are Young" (R. 133, Pltf's Ex. 17, a physical exhibit), produced in 1940, and that said motion picture was a dramatization of and unfairly competed with plaintiff's book.

The book discusses economic and social problems from the viewpoint of the younger generation and presents plaintiff's thoughts and ideas on the subject. The portions of plaintiff's book which discuss the issues of the presi-

dential campaign of 1936 and compare the philosophies of Karl Marx and Franklin D. Rooveselt, to which the opinion of the Circuit Court of Appeals refers (R. 314-315), are not at all the basis for the charge of infringement. In the main, the material alleged to be infringed (R. 3-6) is contained in Chapter 15 of the book (Pltf's Ex. 2, a physical exhibit).

The title, "We Who Are Young," had never been used for any book, play, literary work, or motion picture prior to the publication of plaintiff's book (R. 270 (5)). The title was an independent conception of the plaintiff (R. 72) and was also part of the literary material of the book (Pltf's Ex. 2, a physical exhibit, pp. 9 and 216).

Although on July 18, 1940, the defendant was notified in writing of plaintiff's claims (R. 233, 257-258, Deft. Ex. 48), it nevertheless continued to distribute said motion picture (R. 65, 83).

The defendant alleged that its motion picture was the result of independent activities of defendant's employees and one Dalton Trumbo (R. 34, Par. 13). A "rewritten version" of a story, "To Own The World," (R. 215, Deft's Ex. A, a physical exhibit), was introduced in evidence by the defendant as having been purchased from said Dalton Trumbo. The original draft was not produced (R. 159).

Plaintiff testified that the portions of his book alleged to be infringed were the result of his own independent thought and writing (R. 69-72).

Rulings of the Courts Below.

The cause was referred to a Master who took testimony and viewed the picture with sound effects (R. 132). He found the defendant's motion picture was an infringement and dramatization of portions of plaintiff's book and unfairly competed with same (R. 259-273).

The district judge heard the case on objections to the Master's report (R. 276-284), and also viewed the picture (R. 57). He adopted the findings of fact and conclusions of law of the Master (R. 288-289). The judgment of the District Court was that the defendant be enjoined from exhibiting its motion picture and for damages and an accounting (R. 289-290).

Some of the pertinent findings and conclusions of law of the District Court are as follows:

> "The production, portrayal and presentation through the medium of a motion picture of a non-dramatic work, copyrighted under the Act, constitutes an infringement of the exclusive right to dramatize said non-dramatic work" (R. 272, Par. 3).
>
> "The exclusive right given to the owner of a copyrighted work under the Copyright Statute of the United States, to dramatize a non-dramatic work should be given a liberal application to make effective to the copyright owner such right to dramatize" (R. 272, Par. 6).
>
> "To constitute infringement, it is not essential that words, phrases or sentences be copied. The appropriation or unfair use of material portions, treatment, central themes, original thought and ideas may, without the actual taking thereof, constitute an infringement of the copyrighted work" (R. 272, Par. 5).
>
> "Where a title of a copyrighted work is itself part of the copyrighted material of the work, such part so used as the title is protected under the Copyright Statute of the United States" (R. 272, Par. 8).
>
> "The adoption by the infringing work of an identical title is a factor in determining whether there is an infringement, where other similarities exist" (R. 273, Par. 9).

"Access and copying may be proved by circumstantial evidence and may be inferred from a comparison of the two works" (R. 273, Par. 10).

"Defendant's motion picture, 'We Who Are Young' is a dramatization of material portions of plaintiff's copyrighted book, 'We Who Are Young'" (R. 271, Par. 17).

The defendant appealed from the judgment of the District Court to the United States Circuit Court of Appeals for the Seventh Circuit, which reversed the judgment of the District Court (R. 314).

The Circuit Court of Appeals held that the ultimate finding in the case at bar was "a conclusion of law or at least a determination of a mixed question of law and fact" (R. 321). It did not specifically express any dissent from most of the conclusions of law and findings of fact of the District Court, but reached an opposite result by applying to the facts a construction of the Act which was diametrically opposed to that of the District Court. It is thus apparent that the crux of the entire case is whether the District Court or the Circuit Court of Appeals, in making its comparison of the motion picture with the copyrighted work, applied the correct principles of law.

Questions Presented.

1. Whether the exclusive right to dramatize a "non-dramatic work" conferred by Section 1b of the Copyright Act (17 U. S. C. A., 35 Stat. 1075, 1076) includes supplying in such process of dramatization, a plot or dialogue, where they are lacking in such "non-dramatic" work as copyrighted.

2. Whether the principles governing the determination of infringement of the right to multiply copies granted under *Section 1a* of the Copyright Act, which involves com-

parison with the copyrighted work in the form in which it was copyrighted, are applicable to the determination of infringement of the exclusive right to dramatize under *Section 1b* of said Act, which involves a consideration by the Court of the changes necessary to put the copyrighted work into a dramatized form.

3. Whether Section 4 of the Copyright Act which covers "all of the writings of an author," and Section 1b which grants the exclusive right to dramatize, protect the *title* of a book where such title is also part of the literary composition of the book, where such title is an independent conception of the author, and where such title had never been used before as the title for any other book, play or literary work.

4. Whether the evidence was sufficient to support a finding of infringement and unfair competition.

5. Whether objections to a Master's report, which do not point out specifically the errors relied upon and are almost devoid of record references, properly present any questions for the consideration of the Court.

6. Whether the law of unfair competition protects the exclusive right to dramatize a non-dramatic work, granted by Section 1b of the Copyright Act.

7. Whether secondary meaning must be proved for a title which is not descriptive of the contents of the book to which it is applied and which has never before been used as the title for any other book, play or literary work.

Statutes Involved.

The parts of Section 1 of the Copyright Act (17 U.S.C.A.: 35 Stat. 1075, 1076) pertinent hereto are as follows:

> "Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

(a) to print, reprint, publish, copy and vend the copyrighted work;

(b) * * * to dramatize it if it be a non dramatic work; * * *''

Section 4 of the Copyright Act (17 U.S.C.A.; 35 Stat. 1076, Chap. 320, Par. 4):

''The works for which copyright may be secured under this title shall include *all of the writings* of an author.'' (Italics ours.)

Jurisdiction of the Court.

The decision below was entered on February 20, 1943.

The Statute under which jurisdiction is invoked is Section 240 (a) of the Judicial Code, as amended by the act of February 13, 1925; Chap. 229, Section 1; 43 Stat. 938; U. S. C. A. Title 28, Section 347 (a).

Reasons Relied on for Allowance of Writ.

1. The Circuit Court of Appeals erred in construing Section 1b of the Copyright Act by denying the protection thereof to plaintiff's non-dramatic work because it did not contain story, plot or characters. The act contains no such limitation. Because of the wide dramatization for motion pictures of books of all types, the construction of Section 1b presents an important question of Federal law which has not been but should be settled by this Court. The strict construction of the Copyright Act adopted by the Circuit Court of Appeals is in conflict with the liberal construction of the Act announced by this Court in *Washingtonian Co.* v. *Pearson,* 306 U. S. 30, 36. (The dissenting opinion of Justice Black was on other grounds.) See also *American Tobacco Co.* v. *Werckmeister,* 207 U. S. 284, 291.

2. The decision of the Circuit Court of Appeals is in conflict with the decision in *Dam* v. *Kirk La Shelle*, 175 Fed. 902 (C.C.A. 2). The Circuit Court of Appeals herein erroneously refused to follow the above case because "plaintiff's book has no plot" (R. 319).

3. The Circuit Court of Appeals erroneously failed to give effect to Section 4 of the Copyright Act, which extends the protection of copyright to "all of the writings of an author," by holding that such protection does not extend to the title (R. 316). This is an important question of Federal law which has not been but should be settled by this Court. The exclusive right to dramatize conferred by Section 1b is ineffective unless it protects the title.

4. The exclusive right to dramatize granted by the Copyright Act is entitled to protection under the law of unfair competition. The decision of the Circuit Court of Appeals, that there was no unfair competition between plaintiff's book and defendant's motion picture failed to give effect to such right to dramatize and was, therefore, probably in conflict with the state law, as yet unannounced by the highest court of the state.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued under the seal of this Court directed to the United States Circuit Court of Appeals for the Seventh Judicial Circuit, sitting at Chicago, Illinois, commanding said court to certify and send to this court on a day to be designated, a full and complete transcript of the record and all proceedings of the Circuit Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court; that the judgment of the Circuit Court of Appeals be reversed, and that petitioner be granted such other and further relief as may seem proper.

MOSES LEVITAN,
Counsel for Petitioner.

BRIEF IN SUPPORT OF THE PETITION.

Opinion Below.

The District Court did not render a written opinion, but it adopted the findings of fact and conclusions of law of the Master (R. 288), which appear at R. 269-273. The opinion of the Circuit Court of Appeals for the Seventh Circuit (R. 314-321) is reported in 133 Fed. (2nd) 889.

Jurisdiction.

The jurisdiction has been set forth in the petition.

Statement of the Case.

The facts are stated in the petition to which reference is here made.

Specifications of Errors.

The Circuit Court of Appeals for the Seventh Circuit erred,

1. In failing to construe Section 1b of the Copyright Act so as to grant protection to non-dramatic works which contain neither plot nor dialogue.

2. In failing to hold that the exclusive right to dramatize conferred by Section 1b of the Copyright Act, includes the right to supply in the process of dramatization, a plot or dialogue.

3. In failing to hold that where a title of a copyrighted work is itself part of the copyrighted material of the work, such part so used as the title is protected under the Copyright Act.

4. In failing to hold that the exclusive right to dramatize a non-dramatic work, granted by Section 1b of the Copy-

right Act, includes protection of the title where such title is also part of the context of the book.

5. In applying principles of law applicable to the determination of infringement of the right to multiply copies under Section 1a to the determination of the question of infringement of the exclusive right to dramatize granted by Section 1b of the Copyright Act.

6. In separating the title of the copyrighted work from its context in determining the question of infringement by dramatization under Section 1b of the Copyright Act.

7. In holding as a matter of law or mixed questions of law and fact that defendant was not guilty of infringement or unfair competition.

8. In reversing the judgment of the District Court, which overruled defendant's objections to the Master's report, where such objections were not specific.

9. In failing to hold that the exclusive right to dramatize a non-dramatic work granted by Section 1b of the Copyright Act is protected under the law of unfair competition.

10. In holding that secondary meaning must be proved for a title not descriptive of the contents of the book, where such title had never been used before as the title for any other book, play or literary work.

Summary of Argument.

The points of argument follow in the main the reasons relied upon for the allowance of the writ of certiorari.

ARGUMENT.

I.

The Circuit Court of Appeals erred in construing Section 1b of the Copyright Act by denying the protection thereof to plaintiff's non-dramatic work because it did not contain story, plot or characters. The Act contains no such limitation.

The parts of Section 1 of the Copyright Act (17 U.S.C.A.) pertinent hereto are as follows:

> "Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:
>
> (a) to print, reprint, publish, copy and vend the copyrighted work;
>
> (b) * * * to dramatize it if it be a non-dramatic work; * * *"

It is apparent that the Circuit Court of Appeals, throughout its opinion, has placed a limitation on the word "non-dramatic" not warranted by the clear language of the Act, thus denying to plaintiff's non-dramatic work the protection of Section 1b.

Thus the Court says:

> "Here plaintiff's book could not be dramatized without being rewritten so thoroughly as to make it another book." (R. 319)
>
> "*A fortiori,* where, as in the instant case, the subject matter is completely abstract and where there are no characters, it seems to us that plaintiff has no valid claim of infringement." (R. 319)

"*Dam* v. *Kirk La Shelle,* 175 F. 902, merely holds that a plot may not be stolen without infringement. Here plaintiff's book has no plot." (R. 319)

"And the exclusive right to 'dramatize' it, which plaintiff protests was violated, would entail a complete re-writing, even to put it into form for a storyless newsreel or feature." (R. 319-320)

Since the Circuit Court of Appeals has said, "the ultimate finding is a conclusion of law or at least a determination of a mixed question of law and fact," (R. 321), it is apparent that the diametrically opposite findings of the District Court and the Circuit Court of Appeals result from the conflicting rules of law applied by them in making their comparisons of the book with the motion picture. It is of paramount importance, therefore, that these questions, never before presented to this Court, be settled.

If the exclusive right to dramatize a non-dramatic work is to be at all effective, then of necessity it must include the right to take whatever steps the author may deem necessary to convert his non-dramatic work into a dramatic work. To place a limitation on this right (as the Circuit Court of Appeals has done) because of the *degree* of change considered necessary to convert a copyrighted work into a dramatic work, is to read into the Act a limitation on the exclusive right granted therein, entirely unjustified by its clear language. Of course, the non-dramatic work has to be "rewritten" (R. 319-320) in order to dramatize it. To hold that the very steps necessary to effect such dramatization cannot be taken, is to nullify the valuable rights which the Act gives.

It is respectfully submitted that the plain language of Section 1b, which covers non-dramatic works without qualification as to type or character, entitles plaintiff's work to protection thereunder.

The modern development of the talking motion picture has made possible the use of the most widely diversified material for adaptation to the screen. Literary works without "plots" have been frequently adapted for motion pictures. The talking motion picture has, in fact, become a most important vehicle for public enlightenment, and there is virtually nothing that can be written which cannot be dramatized for motion picture purposes. Supplying "stories" or "plots" is by no means difficult.

The Circuit Court of Appeals has thus in effect held that the "story" features of defendant's motion picture, which are admittedly not found in plaintiff's book, constitute the differentiating factors which disprove the infringement. But if effect is to be given to Section 1b of the Act, then the right to dramatize of necessity includes the right to supply the very features, the lack of which is assigned by the Circuit Court of Appeals as a reason for denying relief to plaintiff. Thus again, the decision of the Court of Appeals nullifies the unqualified protection granted by Section 1b of the Act.

To hold that a motion picture company is not infringing when it dramatizes for an audience the combination of ideas copyrighted by another (by embodying those ideas in the experiences of specific characters by means of a "plot" or "story"), is to take away the exclusive right to dramatize granted by the Act to the copyright holder and to give it to the first infringer.

Since the case of *Kalem Co.* v. *Harper Bros.*, 222 U. S. 55 (which construing the 1891 Act held that a motion picture could be a dramatization of a book), this Court has not construed Section 1b of the Copyright Act. None of the questions of construction involved herein were there discussed. It is respectfully submitted, therefore, because of the wide practice in modern times of adapting non-dramatic works to motion pictures, that the rules govern-

ing the protection to be accorded to authors should be settled by this Court.

The Circuit Court of Appeals in construing Section 1b of the Act, has applied the law relating to Section 1a. Section 1a covers the right to multiply copies. The right involved herein, viz., the exclusive right to dramatize granted by Section 1b calls for the application of different principles. Under Section 1a, the Court has before it two complete works, from a comparison of which *as written* it forms a conclusion. Under Section 1b, the Court has before it a copyrighted work, *not yet dramatized,* which it must compare with an alleged infringing *dramatic work.* It is obvious that the rules applicable to one cannot be applied to the other, for in determining the question of infringement by dramatization, it is apparent that the comparison between the alleged infringed work and the infringing work must be made in the light of a *dramatized version* of the infringed work and not in its form as copyrighted.

The basic question therefore under Section 1b is, "Has there been an interference with the right to dramatize?"

In discussing the distinction between the rights granted under Section 1a and 1b, Weil on Copyright (1917) (Sec. 1123, pp. 427, 428), says:

> "The right to dramatize is a more comprehensive one than the right to prevent unlawful copying * * * the right to make such changes, where requisite, is comprehended in the right of dramatization * * * Any substantial encroachment on such rights would be infringement."

The Circuit Court of Appeals held:

> "If we compare the two works, we find contrasts rather than similarities, and the resemblances, if any, between the subject matter of plaintiff's book and the picture are not important." (R. 318)

The Court goes on to explain as follows:

> "Plaintiff's book has no plot, while the motion picture is built on a plot which supplies much of the merit of the play. Plaintiff's book is written in essay form. The talking picture necessarily uses dialogue. Plaintiff's book has no sequence of incidents. The talking picture progresses from incident to incident in spinning out the story. Plaintiff's book deals with abstract economic ideas, whereas defendant's picture presents a romantic love story. Plaintiff's book has no characters while the movie shows warmly human characters who have distinctive individual traits, humorous or otherwise." (R. 318)

The Circuit Court of Appeals in the above quotations has obviously missed the point at issue, for all it has done is to point out the mechanical differences in *form* which necessarily exist between a dramatic work and a non-dramatic work of the type written by plaintiff. The "resemblances" to which the opinion refers are not discussed but are dismissed as "not important."

Similar misconstructions resulting from what amounts to a "verbatim" comparison by the Circuit Court of Appeals are found in the statement that no "concrete form" was copied (R. 316), (citing *Eichel* v. *Marcin*, 241 F. 404, 408, which involves Sec. 1a and not Sec. 1b), or that a comparison reveals no wrongful appropriation of "original thoughts and ideas," "central themes," or "material portions" of the book (R. 317), or that the resemblances between the book and the picture were limited to one single idea (R. 317). The Master and the District Court, however, made their comparisons with the motion picture from the viewpoint of a dramatization of plaintiff's book, and found that defendant's motion picture dramatized material portions thereof (R. 271, par. 17).

The Circuit Court of Appeals did not follow the liberal construction of the Copyright Act adopted by this Court.

The Constitution of the United States (Art. 1, Sec. 8, par. 8) gives Congress the power to secure to authors the exclusive right to their writings for a limited time. Pursuant to this power, Congress enacted Copyright Laws and from time to time has revised them, broadening the scope of the rights granted.

Construing the protection of copyright under the Act of 1891, this Court said, in *American Tobacco Co.* v. *Werckmeister*, 207 U. S. 284, 291:

> "These statutes should be given a fair and reasonable construction with a view to effecting such purpose."

The same case (p. 291) holds:

> "The foundation of all rights of this description is the natural dominion, which everyone has over his own ideas, the enjoyment of which, although they are embodied in visible forms or characters, he may, if he chooses, confine to himself or impart to others."

The Act of 1909, under which the instant case is brought, has been characterized by this Court in *Washington Co.* v. *Pearson*, 306 U. S. 30, 36 (involving the registration provisions of the Act), as follows:

> "The Act of 1909 is a complete revision of the copyright laws, different from the earlier Act both in scheme and language. It introduced many changes and was intended definitely to grant valuable, enforceable rights to authors, publishers, etc., without burdensome requirements, 'to afford greater encouragement to the production of literary works of lasting benefit to the world.'"

It is respectfully submitted that the construction adopted by the Circuit Court of Appeals in the case at bar is completely at variance with the liberal policy of this Court and is so strict that the right of dramatization granted by Section 1b will be nullified in many cases, as it has been in the case at bar.

II.

The decision of the Circuit Court of Appeals is in conflict with Dam v. Kirk La Shelle, 175 Fed. 902, 907 (CCA 2). The absence of a plot is not a bar to the exercise of the exclusive right to dramatize granted by Section 1b of the Act.

A leading case on infringement by dramatization in which the Act is construed is *Dam* v. *Kirk La Shelle,* 175 Fed. 902, 907 (CCA 2). The Court there said:

> "But the right given to an author to dramatize his work includes the right to adapt it for representation upon the stage which must necessarily involve changes, additions, and omissions. * * * The statute giving authors of copyrighted works the exclusive right to dramatize them must receive a reasonably liberal application or it will be wholly ineffective. * * * Unless the copyright statute is broad enough to cover any adaptation which contains the plot or theme of the story, it is wholly ineffective."

The Circuit Court of Appeals rejected the authority of the above case because "here plaintiff's book has no plot" (R. 319), thus placing an entirely unwarranted limitation on Section 1b of the Act. (See Point I, this brief.)

In *Sheldon* v. *Metro Goldwyn Pictures Corp., et al.,* 81 F. 2nd 49, 55, 56 (C.C.A. 2 cert. den.), in discussing the

wide protection afforded by the Act against infringement in various guises, the Court says:

> "We have often decided that a play may be pirated without using the *dialogue* (citing cases). * * * it may often be most effectively pirated by leaving out the speech, for which a substitute can be found, which keeps the whole dramatic meaning."

(Compare the above quotation with the following language in the opinion: "None of the scenes or *dialogue* were plagiarized from his book." (R. 318)) (Italics ours)

The fact that much of defendant's picture contains material not found in plaintiff's book is not a defense. In *Sheldon* v. *Metro-Goldwyn Pictures Corp., et al.,* 81 Fed. 2nd 49, 56, the Court said:

> "No plagarist can excuse his wrong by showing how much of his work he did not pirate."

III.

The title of a copyrighted work is protected under Sections 1b and 4 of the Copyright Act.

Section 4 of said Act, as amended (1909), reads as follows:

> "The works for which copyright may be secured under this title shall include *all of the writings** of an author." (Italics ours.)

The Circuit Court of Appeals in its decision cites several cases to the effect that "the copyright of a book or play does not give the copyright owner the exclusive right to the use of the title" (R. 316). These cases either antedate

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* The prior Act (Rev. Stat. of the U. S., Title 60, Chap. 3, Sec. 4952) confers copyright on the "book".

or incorrectly announce the law under the 1909 amendment of the Copyright Act now in force (see above).

It is respectfully submitted that since the title of a copyrighted work is just as much a part of the "writings" of an author as the remainder of such work, (in many cases involving literary effort) there is no reason why the Act does not protect such title to the same extent that it protects the remainder of the copyrighted material. This is particularly true in the case at bar, where the title is also part of the context of the book itself, was an original writing of the plaintiff, independently conceived, and had never been used before as the title for any other book, play or literary work (R. 67, Pltf's Ex. 2, a physical exhibit, pp. 9 and 216; R. 72, 270-(5)).

Weil on Copyright in discussing the protection of the title says (1917, P. 447, Sec. 1176):

> "How fair use may be made of a title is an open question, as various cases hold that there can be no copyright in a title separately from the work to which it refers. These cases are founded on statutes which conferred copyright upon *books*, and are, hence, deemed inapplicable under the present statute which covers 'original writings', whether books or not." (Italics ours.)

The Circuit Court of Appeals in holding that "neither the words nor the particular combination of words, 'We Who Are Young,' are unique" (R. 317), was under the apparent misapprehension that the Copyright Act, like the Patent Law, protects only that which is novel or unique. The Act contains no such requirement and the cases are to the contrary. *Sheldon* v. *Metro-Goldwyn Pictures Corp., et al.*, 81 Fed. 2nd 49, 53, 54 (citing *Bleistein* v. *Donaldson Lithographing Co.*, 188 U. S. 239, 249; *Gerlach-Barklow Co.* v. *Morris & Bendien, Inc.*, 23 F. (2nd) 159, 161.) (It is not contradicted that the title was independently conceived by plaintiff (R. 72).)

It is respectfully submitted that the federal question here discussed is of great importance to authors, for if the exclusive right to dramatize, granted by Section 1b, is to be effective, the Act must protect the title in protecting the work. Because of the changes necessarily involved in dramatization, the title is a strong identifying feature. If the protection of the title by the Act is denied to the copyright holder, then a title which has found favor in the eyes of a producer could be affixed to a motion picture before the copyright holder has an opportunity to avail himself of his right to dramatize. This right, by the terms of the Act, is exclusively the author's during the life of the copyright. In effect, such a failure of the Act to afford protection would nullify the exclusive right granted.

Treating the title as unprotected, the Circuit Court of Appeals, in determining the question of infringement by dramatization, failed to consider the context of plaintiff's book and the title as one inseparable whole.

The District Court found that the appropriation of plaintiff's identical title, in connection with other similarities, was "corroborative circumstantial evidence of access and copying" (R. 271, (16)), and concluded as a matter of law that:

> "The adoption by the infringing work of an identical title is a factor in determining whether there is an infringement, where other similarities exist." (R. 273, Par. 9)

This guiding rule is a sequitur if Section 4 protects the title. It is respectfully submitted that the District Court correctly announced the law.

IV.

The exclusive right to dramatize granted by the Copyright Act is entitled to protection under the law of unfair competition.

The Circuit Court of Appeals held:

> "Since we can see no grounds for confusion of plaintiff's general economic discussion with defendant's romatic love story, we conclude that there was no unfair competition." (R. 321)

In treating with the works *as written*, the Circuit Court of Appeals erred because it failed to consider the plaintiff's right to dramatize his book for motion pictures. The Copyright Act, giving plaintiff the exclusive right to dramatize his non-dramatic work, created a right in being which was as much entitled to protection from unfair competition as, for example, the right to the use of a trade name or trade mark. This right was not dependent on the volume of sales, nor on the memory of the public, as the Circuit Court of Appeals held (R. 320), but was valid and subsisting for the life of the copyright.

The above view is supported in *Ladas*: *International Protection of Literary and Artistic Property* (Harvard Studies in International Law III) (1938) Vol. 2, Sec. 343 at pp. 738 and 739:

> "In view of the fact that modern theory of unfair competition in general is broader than in the past, this [actual competition] should not be insisted upon, especially in view of the fact that the modes of reproduction of a successful work at the present time are quite numerous and there is a potential market which authors have an interest in protecting. Thus the author may contemplate cinematographic reproduction and the use of its title by others for a film may prejudice the salability of his story."

See *International Service Co.* v. *Associated Producers,* 273 Fed. 585, 587, and *Patten* v. *Superior Talking Pictures,* 8 Fed. Supp. 196, 197.

In Frohlich & Schwartz on *The Law of Motion Pictures* (1918) p. 434, the author points out that under the Copyright Act the owner has the sole and exclusive right to dramatize; that a stranger who puts out a motion picture under the same title is anticipating the right given to the copyright owner who, when he attempts dramatization, is faced with the dilemma that if he uses the title he has conceived, he is unfairly competing with the stranger who has prior use of the title for a motion picture.

We do not believe that this Court will approve as "fair competition", such an interference with the exclusive right to dramatize.

The precise question here involved, viz. the protection of the Federal right (exclusive right to dramatize) under the law of unfair competition, has not been decided by the courts in Illinois or by this Court. However, since every state protects against unfair competition, the decision of the Circuit Court of Appeals is probably in conflict with the state law, as yet unannounced by the highest court therein, in that it fails to recognize and protect an important right granted by a Federal Act.

* * *

The decision of the Circuit Court of Appeals, that a title must attain secondary significance before any property rights in it can be protected, is in conflict with the applicable decisions of this Court.

The title of plaintiff's book is not descriptive of its contents and under such circumstances, no secondary meaning need be proved for it. This Court held in *Hamilton Shoe Co.* v. *Wolf Brothers,* 240 U. S. 251, 256, that the trademark, "The American Girl," as applied to shoes

is neither geographical nor descriptive of its product. This Court said:

> "Indeed, it does not, in its primary signification, indicate shoes at all. It is a fanciful designation, arbitrarily selected * * *" (p. 256).

See also *Gannert* v. *Rupert,* 127 F. 962, 963, where the title "Comfort" was held not to be descriptive of a magazine. (Compare opinion of Circuit Court of Appeals (R. 317), holding that the words, "We Who Are Young," "are merely a descriptive phrase in the English language * * *".)

CONCLUSION.

From the foregoing, it appears that the Circuit Court of Appeals for the Seventh Circuit has now rendered a decision in conflict with the controlling and applicable decisions of this Court, in conflict with applicable decisions of other Circuit Courts of Appeal, in a case of great importance to authors and the public generally, and which decision has seriously prejudiced the rights of petitioner.

Respectfully submitted,

Moses Levitan,
Counsel for Petitioner.

(32)

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 1024

HARRY BECKER,

Petitioner,

vs.

LOEW'S INCORPORATED, A DELAWARE CORPORATION,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

HERBERT M. LAUTMANN,
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Summary of Argument.

I.

Unless there is copying of a substantial part or portion of a copyrighted work, there is no infringement. In the case at bar there was no copying and there are no similarities whatever between petitioner's book and respondent's motion picture..... 5

II.

Unless access is shown there is no infringement. Neither the author of the film script, nor any of the employees of respondent who produced the picture, knew of petitioner's book prior to the production of the picture 6

III.

Copyright does not protect title. In addition, in the case at bar the title was the independent creation of respondent 8

IV.

Petitioner's book is an expression in essay form of generalized abstract ideas and thoughts. Petitioner's book could not be dramatized without being entirely rewritten. Protection under the provisions of the copyright act (including the so-called "exclusive right to dramatize") does not extend to abstract thoughts or ideas. It is not the subject but the "treatment" of the subject which is protected by copyright..... 10

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VI.

Petitioner's title never attained secondary meaning. Respondent's picture was not in unfair competition with petitioner's book 11

VII.

Prior to the production of respondent's motion picture there was an affirmative failure of petitioner's book to attain secondary meaning; sales of petitioner's book having ceased. Thus, even if the title had not been independently conceived by respondent, respondent's use of the title did not deprive petitioner of an opportunity for his work to acquire secondary meaning. In this case, therefore, there is no occasion to determine whether under the copyright act an author has the right to be given sufficient time for his work to acquire secondary meaning 12

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 1024

HARRY BECKER,

Petitioner,

vs.

LOEW'S INCORPORATED, A DELAWARE CORPORATION,

Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Nature of the Case.

This action was brought for an accounting of profits, an injunction and damages, because of (a) the alleged infringement of copyright of petitioner's book by respondent's motion picture, and (b) the alleged unfair competition of the motion picture with the book.

The District Court entered judgment for petitioner. (R. 289.) Upon appeal to the United States Circuit Court of Appeals for the Seventh Circuit, the judgment of the District Court was reversed and remanded to the District

Court with directions to dismiss the Complaint. (R. 322.) The opinion of the court is set forth at pages 314-321 of the record.

The Book and the Picture.

The motion picture was viewed by the Court below upon the argument of the appeal. In its opinion the Circuit Court of Appeals concisely and correctly summarizes the book and picture as follows:

(a) The book:

"In August, 1936, the plaintiff, Harry Becker, wrote and copyrighted a book entitled 'We Who Are Young,' discussing economic and political problems with particular reference to the Roosevelt-Landon Presidential campaign. It did not have a large sale. Possibly 700 copies of the book were distributed by gift or sale, nearly all of them during 1936, and it was reviewed in some newspapers shortly after its publication. The book compares the doctrines of President Roosevelt as opposed to those of reactionaries and Karl Marx, and shows that the source material was 'Das Kapital' by Marx, 'Looking Forward' and 'On Our Way' by President Roosevelt, Taussig's 'Principles of Economics' and Walter Lippman's 'The New Method of Freedom.' The book has no plot, no story, no character developments, no sequence of incidents, only an abstract, general discussion in essay form. And plaintiff's claim for infringement rests on such general passages as: 'We who are young, have seen this strife for property and find it not to our liking. We do not want to struggle ceaselessly to accumulate property to gain an illusory security. We would rather have security without great wealth.' " (R. 314-315.)

(b) The picture:

"Bill, the husband, and Margy, his young wife, worked for the same business firm which had a rule that no married woman might work there. When their marriage was discovered, Margy was dismissed. The furniture company repossessed their household goods

after Margy discovered she was going to become a mother. Bill lost his job and could not find another. Finally, however, an acquaintance got a job for him and Bill hurried back to his prior employer's office to get an office survey system which he had developed; on meeting Beamis, his former employer, he angrily told him what he thought of the firm's management. When he returned home, Bill found Margy in agony. After unsuccessfully trying to get an ambulance, Bill stole a car, bundled Margy into it, and started for the hospital. Policemen stopped him, but on taking in the situation, cleared traffic with their sirens while Bill drove at breakneck speed to the hospital where Mary gave birth to twins. When the car owner withdrew his complaint and Beamis sent Bill a letter asking him to come back to the firm under new conditions, Bill faced a new and brighter future. Plot, story, incident, and character development were used to bring out the romantic theme." (R. 315-316.)

Jurisdiction.

There is no question involved in this case which warrants review by this Court.

The case presents no question suggested by General Rule 38, Subdivision 5 (b) of this Court. Accordingly, the petition should be denied (*Keller* v. *Adams Campbell Co.*, 264 U. S. 314, 319; *Layne & Bowler Corp.* v. *Western Well Works*, 261 U. S. 387, 393; *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, 178-179).

Questions Set Forth in the Petition.

Petitioner has enumerated seven questions said to be presented. In the main, these questions are hypothetical and are not present in this case.

The Questions in This Case.

The sole questions in this case are:

(a) Whether a motion picture independently conceived and produced and exhibited for entertainment, which depicts a romance between a newly married couple, infringes the copyright on a book published for use during the Roosevelt-Landon Presidential campaign in the year 1936, and which discusses in the most abstract terms and in a serious vein economic and social problems of that day.

(b) Whether the said motion picture, entitled "We Who Are Young," released in 1940, unfairly competes with the said book, likewise entitled "We Who Are Young," where but 700 copies of the said book were distributed by gift or sale, nearly all of them during the year 1936.

By its decision, both of these questions were answered in the negative by the Court below.

ARGUMENT.

I.

The Motion Picture Bears No Resemblance to the Copyrighted Work and There Are No Similarities Between Them.

In petitioner's book there is no story, plot or characters. It is devoid of any incidents, dramatic or otherwise. The book merely discusses political and economic theories—long in the public demesne—in the most general terms, and petitioner's ideas relative thereto.

In *Shipman* v. *R. K. O. Radio Pictures*, 100 F. (2) 533 (C. C. A. 2), Judge Learned Hand, writing for the Court, said:

> "*Nichols* v. *Universal Pictures Corp.*, followed exactly the same doctrine that we are using now; it held that there is a point where the similarities are so little concrete (are therefore so abstract) that they become only 'theme,' 'idea,' or skeleton of the plot, and *that these are always in the public domain; no copyright can protect them.*" (Italics ours.)

The motion picture is a love story concerning a young married couple and tells of their experiences in establishing themselves. The motion picture expresses no political or economic theories, nor are these theories discussed. The photoplay is predicated upon various instances and experiences, either personal to the author (Dalton Trumbo) or to his friends and acquaintances. (R. 315.)

Unless there has been a copying of a substantial part or portion of the copyrighted work there is no infringement (*Nichols* v. *Universal Pictures Corp.*, 34 F. (2) 145; affirmed 45 F. (2) 119; certiorari denied 282 U. S. 902; *Holmes* v. *Hurst*, 174 U. S. 82; *Sheldon* v. *Metro-Goldwyn Pictures Corp.*, 81 F. (2) 49; *Shipman* v. *R. K. O. Radio*

Pictures, 100 F. (2) 533; *Harold Lloyd Corporation* v. *Witwer,* 65 F. (2) 1.

Mere similarities do not constitute infringement (*Roe-Lawton* v. *Hal E. Roach Studios,* 18 F. (2) 126; *Kustoff* v. *Chaplin,* 120 F. (2) 551; *Fendler* v. *Morosco,* 253 N. Y. 281; *Bein* v. *Warner Bros. Pictures, Inc.,* 105 F. (2) 969).

By copyrighting his book petitioner merely obtained protection of the manner in which he expressed his ideas,—not of the ideas themselves. (*Dorsey* v. *Old Surety Life Ins. Co.,* (C. C. A. 10) 98 F. (2) 872, 873; *Ansehl* v. *Puritan Pharmaceutical Co.,* (C. C. A. 8) 61 F. (2) 131, 132; certiorari denied 287 U. S. 666; *Kaeser & Blair, Inc.* v. *Merchants' Ass'n, Inc.,* (C. C. A. 6) 64 F. (2) 575, 577; *Eichel* v. *Marcin,* 241 F. 404; Amdur on Copyrights, 1936 Ed., p. 5; Drone on Copyright, pp. 98, 385.

In the case at bar, there is no similarity in phrase, style or mode of expression between the two works involved. The fact is there is no similarity whatever, substantial or otherwise.

II.

Respondent Did Not Have Access to Petitioner's Book.

The picture was based upon a work written by Dalton Trumbo, an experienced novelist and writer, who gave his play the title, "To Own The World." After the picture was produced, but before it was released, several changes were made in the title, and finally at the suggestion of Frank Whitbeck, an employee of defendant, the title, "We Who Are Young," was chosen. Whitbeck had never heard of plaintiff's book until after he suggested the title. (R. 315.) Trumbo "had no knowledge of plaintiff's book or its contents and he wrote the story in 1939, basing it on his own experience and those of his friends, who were

attempting to solve the problem of getting married on a small salary". (R. 315.)

Unless defendant had access to the copyrighted work and unless there was copying there could be no infringement. (*Shipman* v. *R. K. O.*, 20 F. S. 249, affirmed 100 F. (2) 533.) The evidence showed that neither Trumbo, the author, nor the producer, the director, nor anyone who had any connection with the picture ever heard of petitioner or of his book prior to the production of the picture. As was stated in *Harold Lloyd Corporation* v. *Witwer*, 65 F. (2) 1 (C. C. A. 9), at p. 16:

> "Without such knowledge there could be no copying and their production would have been original no matter how closely it resembled (plaintiff's) story."

"In order to copy, one must have something to copy from" (*Frankel* v. *Irwin*, 34 F. (2) 142, 143).

Even if there were similarities between the two works, unless those similarities were the result of access and copying there would be no infringement.

> "* * * but if by some magic a man who had never known it were to compose anew Keats' Ode on a Grecian Urn, he would be an 'author,' and, if he copyrighted it, others might not copy that poem, though they might of course copy Keats'." (*Sheldon* v. *Metro-Goldwyn Pictures Corporation*, 81 F. (2) 49, 54; certiorari denied 298 U. S. 669.)
>
> "* * * the law imposes no prohibition upon those who, without copying, independently arrive at the precise combination of words or notes which have been copyrighted." (*Fisher, Inc.* v. *Dillingham, et al.*, 295 F. 145, 147.)

III.

The Copyright Did Not Protect the Title of Petitioner's Book.

Without exception, the cases hold that a title is not protected by copyright. (*Warner Bros. Pictures, Inc.* v. *Majestic Pictures Corporation, et al.*, 70 F. (2) 310; *International F. Service Co.* v. *Associated Producers*, 273 F. 585; *Atlas Mfg. Co.* v. *Street & Smith*, 204 F. 398; *Glaser* v. *St. Elmo Co.*, 175 F. 276; *Corbett* v. *Purdy*, 80 F. 901; *Harper* v. *Ranous*, 67 F. 904; *Osgood* v. *Allen*, Fed. Cas. No. 10,603; *Collins* v. *Metro-Goldwyn Pictures Corporation et al.*, 25 F. Supp. 781; *Affiliated Enterprises, Inc.* v. *Rock-Ola Mfg. Corp.*, 23 F. Supp. 3; *Patten* v. *Superior Talking Pictures, Inc.*, 8 F. Supp. 196; *Oxford Book Co., Inc.* v. *College Entrance Book Co., Inc.*, 98 F. (2) 688; *Francis Day & Hunter Limited* v. *Twentieth Century Fox Corporation Limited et al.*, 56 Times Law Reports 9.)

Even if petitioner's title were protected by copyright there would be no infringement in the instant case, because the title was independently conceived by defendant. As the Circuit Court of Appeals stated in its opinion (R. 315), "the story by Trumbo was originally entitled 'To Own the World,' the title of the photoplay was changed to 'I Do' and finally, on the suggestion of one Whitbeck, defendant's employee, to 'We Who Are Young.' Whitbeck testified that he had never heard of plaintiff's book until after he had suggested the title to defendant."

Sheldon v. *Metro-Goldwyn Pictures Corporation, supra.*

Fisher, Inc. v. *Dillingham, et al., supra.*

But petitioner contends that because his title is taken from the context of his book, he is entitled to protection under the copyright law (petitioner's brief, p. 19). Upon

examination, it will be found that in a great many instances titles stem directly from the context. Since there was no access to petitioner's book, this theory, even if correct, would not be applicable in the instant case. However, even if there has been access, petitioner's theory finds no support in the statute or in the adjudicated cases. The fact is that the particular phrase constituting petitioner's title is not entitled to protection even within the context of the book. As is stated by the Circuit Court of Appeals in its opinion (R. 317):

> "Neither the words nor the particular combination of words 'We Who Are Young' are unique. They are not the type of words to be found only in the vocabulary of a Bentham or a Veblen, but are, with minor variations, extremely common and generally used by everyone. They are merely a descriptive phrase in the English language, *Oxford Book Co.* v. *College Entrance Book Co.*, 98 F. (2) 688. These identical words were used in a report of William W. Hinckley to the Third American Youth Congress entitled 'Young Seeks Peace—Freedom and Progress,' published shortly before plaintiff's book. Shakespeare used substantially similar words, 'we that are young,' in the closing lines of 'King Lear.' Similar words taken from the context of a copyrighted book for its title have not been protected by the copyright when used as a title for a motion picture. *Collins* v. *Metro-Goldwyn Pictures Corp.*, 25 F. S. 781."

The author of a title expressing an idea or thought is not given a monopoly thereof by the statute, because that would result in a monopoly of the thought, idea or subject expressed. If words or phrases constituting a title were protected by copyright a substantial part of the field of expression and thought would soon be monopolized by a few authors. This would clearly be contrary to all substantive law in the matter of copyright.

IV.

The Exclusive Right to Dramatize Does Not Give to an Author a Monopoly of His Ideas or Thoughts, or of the Subject Matter of His Writing, But Merely Protects the Author's Mode of Expression.

Petitioner's book could not be dramatized without being entirely rewritten. (R. 319.) But petitioner argues that the exclusive right to dramatize under Section 1b lodges in him the sole right to dramatize the subject matter and title of his book.

It is axiomatic that Copyright Statute does not extend to abstract thoughts or ideas. It is not the subject that is protected but rather the treatment of the subject (*Nichols* v. *Universal Pictures Corp.*, 45 F. (2) 119; *Echevarria* v. *Warner Bros. Pictures,* 12 F. Supp. 632; *Eichel* v. *Marcin,* 241 F. 404; *Roe-Lawton* v. *Hal E. Roach Studios,* 18 F. (2) 126; *Shipman* v. *R.K.O. Radio Pictures,* 100 F. (2) 533).

In effect, therefore, petitioner contends that the right to dramatize is broader than any other right under the Copyright Statute and gives him a monopoly of general thoughts, ideas and theories contained in his book, which, except for his claim under the right to dramatize, would not otherwise be protected by the statute. Such a contention is contrary to the spirit and purpose of the Copyright Law and has always been rejected (*American Tobacco Co.* v. *Werckmeister,* 207 U. S. 284, 52 L. Ed. 208; *Baker* v. *Selden,* 101 U. S. 99, 25 L. Ed. 841; *Arnstein* v. *Edward B. Marks Music Corporation,* 82 F. (2) 275; *Eichel* v. *Marcin,* 241 F. 404; *Griggs* v. *Perrin,* 49 F. 15).

(See also cases cited under Point I hereof, pp. 5-6 hereof.)

V.

The Decision of the Court Below Is in Harmony With Dam v. Kirk La Shelle Co., 175 F. 902.

Petitioner, at page 17 of his brief, argues that the decision of the Court below is in conflict with *Dam* v. *Kirk La Shelle Co.*, and that it rejected the authority of that case.

Upon an examination of the *Dam* case, it will be found that the decision of the Circuit Court of Appeals is not at war with that case, but, on the contrary, is in complete agreement with it. There it was said by the Court, at page 907:

> "It is undoubtedly true, as claimed by the defendant, that an author cannot by a suggestion obtain exclusive control of a field of thought upon a particular subject. If the playwright in this case without the use of the story, and working independently, had constructed a play embracing its central idea, it may well be that he would not have infringed the copyright of the story."

VI.

Unfair Competition Results Only After the Attainment of Secondary Meaning.

Petitioner's title had not attained secondary meaning. Petitioner's book was published in 1936. Only 700 copies were distributed by gift or sale, nearly all during 1936. Respondent's picture was released in 1940, four years after the publication and distribution of petitioner's book. (R. 314-315, 320.) Before an author is entitled to protection under the doctrine of unfair competition he must show that his title had attained a secondary significance. This petitioner failed to do. (*Kellogg Co.* v. *National Biscuit Co.*, 305 U. S. 111, 118; *Manners* v. *Triangle Film Corp.*, 247 F. 301; *American Fork & Hoe Co.* v. *Stampit Corp.*, 125 F. (2) 472, 475.)

VII.

The Construction of the Copyright Act Relative to Right to Dramatize Is Not Involved; the Book Having Affirmatively Failed to Acquire a Secondary Meaning Before Respondent Conceived and Used the Title.

Petitioner has attempted to inject into this case the issue as to whether an author of a work capable of dramatization is deprived of the right to dramatize if other persons use his title before it has acquired a secondary meaning. That issue is not involved here because: (a) petitioner's copyrighted work could not be dramatized without so much creative work that the dramatic composition would not constitute a plagiarism of the copyrighted work (R. 319) and (b) since there had been but 700 copies of petitioner's work distributed (mostly by gift) and sales had ceased several years before the production of respondent's picture there was no possibility that secondary meaning of petitioner's title still could be acquired. (R. 314, 320.)

Conclusion.

It is respectfully submitted that the petition does not present adequate reasons for the allowance of the writ of certiorari applied for.

Respectfully submitted,

HERBERT M. LAUTMANN,
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1942.

No. 1024

HARRY BECKER,

Petitioner,

vs.

LOEW'S, INCORPORATED, A DELAWARE CORPORATION,

Respondent.

Reply Brief for Petitioner.

Respondent's brief makes practically no attempt to meet the reasons advanced by petitioner for the allowance of the writ of certiorari. Respondent's brief is devoted in the main to questions of fact which are not involved in a petition for certiorari.

The categorical statement (Rspt's. Brief, p. 2), that the Circuit Court of Appeals "concisely and correctly summarizes the book and picture," followed by a quotation from the opinion, is an example of such argument on facts. The quotation itself belies the statement, for the Circuit Court of Appeals does not purport to recite the passages claimed to be infringed but is expressly limited to a *four line* quotation from *one* of such passages. On the other hand, the part of the picture which is described

is not the basis for the claim of infringement. Should certiorari be granted herein, petitioner will show that the evidence amply supports the findings of the Master and District Court of infringement by dramatization, and that the Circuit Court of Appeals erred by applying principles of law not applicable to the case at bar.

That the Circuit Court of Appeals reversed the lower court because of a divergent view of the law is apparent from the following statement:

> "* * * yet where the ultimate finding is a conclusion of law or at least a determination of a mixed question of law and fact, as it is in this case, it is subject to judicial review" (R. 321).

Reasons Relied On For Allowance of Writ.

The brief of respondent leaves completely unanswered the reasons advanced in the petition for the allowance of the writ (Pet. pp. 7-8), namely, that the construction of Section 1b of the Copyright Act, granting to copyright holders the exclusive right to dramatize their works, and Section 4, which extends such protection to *all of the writings* of an author (*e. g.*, the title), present important questions of federal law which have not been but should be decided by this Court; and that interference with the exclusive right to dramatize is protected under the law of unfair competition. These reasons come directly within the suggestions contained in Rule 38, Subdivision 5 (b) of this Court.

Points I and II of respondent's brief (pp. 5-7) are entirely devoted to a discussion of facts. An example is the statement that "Whitbeck had never heard of plaintiff's book until after he suggested the title," (Rspt's. Brief, p. 6) followed by a reference to the opinion at R. 315. The statement, however, is inaccurate for the

opinion merely states that Whitbeck had *so testified.* The Master and the District Court found, however, that Whitbeck had testified falsely to a material fact (R. 266) and nowhere in the opinion of the Circuit Court of Appeals is this finding criticized.

The question of access and independent conception argued by respondent (Rspt's. Brief, pp. 6-8), are also questions of fact. The District Court found as a matter of law that "access and copying may be proved by circumstantial evidence and may be inferred from a comparison of the two works" (R. 273 (10)) and no dissent from this conclusion appears in the opinion of the Circuit Court of Appeals.

We do not understand that it is a practice of this Court to determine questions of fact upon a petition for certiorari and we are not prepared to deviate from this practice by burdening the Court at this time with such a discussion. Suffice it to say, that two successive tribunals, the Master and the District Court, after thorough hearings and review found that defendant was guilty of infringement.

Protection of Title Under the Coppright Law.

Respondent in its brief (p. 8), denies as a matter of law that titles are protected by copyright. The petition herein requests this Court to settle this very question of law, never yet determined by this Court. The above grounds urged by petitioner upon this Court as a basis for granting the petition for certiorari are in no wise answered in respondent's brief.

The Exclusive Right of Dramatization.

Respondent in its brief at page 10, states "* * * petitioner contends that the right to dramatize is broader than any other right under the Copyright Statute and

gives him a monopoly of general thoughts, ideas and theories contained in his book, which, except for his claim under the right to dramatize, would not otherwise be protected by the statute." No such monopoly was sought. Plaintiff's claim is founded on the dramatization by the defendant of his combination of ideas, together with the appropriation of his identical title. These are properly the subject of copyright protection.

However, if Section 1b of the Copyright Act was not enacted for the purpose of protecting that which "would not otherwise be protected by statute," then its passage was an unnecessary gesture. It is precisely because Congress intended to create and protect the broader right of dramatization that it added Section 1b to the Act. One of the reasons for filing the petition for certiorari herein is to determine the scope of this protection. The question is one of great importance to authors and the public generally and this is not denied in respondent's brief.

None of the Supreme Court cases cited by respondent in its brief (p. 10) discuss the question involved herein.

The citation in Point V of respondent's brief (p. 11) from *Dam* v. *Kirk La Shelle Co.*, 175 F. 902, is not applicable herein. The case of *Dam* v. *Kirk La Shelle Co.*, 175 F. 902, was cited by petitioner to show the diametrically opposed views taken by the two Circuit Courts of Appeal in considering the changes inherent in dramatization, in making the comparisons involved (Petitioner's Brief, pp. 11-15).

Unfair Competition.

In Points VI and VII of its brief (pp. 11-12), respondent urges that secondary meaning was not proved for plaintiff's title. Such proof was unnecessary (Pet. Brief, pp.

22, 23). (However, secondary meaning was proved and the Court so found. R. 271 (19).) What petitioner urges in his brief is that the exclusive right to dramatize subsists for the life of the copyright and is entitled to protection from unfair competition (Petitioner's Brief, pp. 21-23). No attempt was made by respondent to meet this issue and none of the cases cited by it discuss unfair competition from the viewpoint of the right of dramatization.

CONCLUSION.

It is respectfully submitted, therefore, that for the reasons urged in the petition, the writ of certiorari should be allowed by this Honorable Court.

Respectfully submitted,

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